



Atty Gen. Op. No. 10 - 1303

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ATTORNEY GENERAL

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March 10, 2010

Mr. Perry J. Mitchell  
3 Patrick's Court  
Ocean View, DE 19970

**RE: Freedom of Information Act Complaint  
Against Ocean View**

Dear Mr. Mitchell:

You currently serve as Councilman for the Town of Ocean View ("the Town"). On January 15, 2010, the Delaware Department of Justice ("DDOJ") received your complaint alleging that the Town violated the Freedom of Information Act ("FOIA") in three respects concerning an executive session of the Town Council on January 12, 2010. You challenge 1) the adequacy of the notice of the executive session in the posted agenda; 2) the exclusion of the town manager from the executive session;<sup>1</sup> and 3) whether the matters discussed were appropriate for an executive session. On January 19, 2010, the DDOJ forwarded your complaint to the Town. We received its response on January 20, 2010. This is the DDOJ's determination of your complaint pursuant to 29 *Del. C.* § 10005(e).

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<sup>1</sup> FOIA does not address whether the Town Council can exclude a Town employee from an executive session, and, therefore, that issue will not be determined here.

### **RELEVANT FACTS**

On January 7, 2010, the Town revised its agenda for its January 12, 2010 regular meeting to include, "5. Executive Session to Discuss Contract and Personnel Issues." You allege you were "led to believe" that the executive session was to discuss the town manager's contract, but that when the Council went into executive session you learned that the topic was the Chief of Police's employment contract. According to the Town, the "the matters raised at the executive session . . . include[d] discussions of current contract terms, negotiation positions, performance evaluations and [negotiation] strategy. . . ."

### **RELEVANT STATUTES**

While 29 *Del. C.* § 10004 requires that all meetings of public bodies be open to the public, it permits a public body to meet in closed (executive) session to discuss any of nine enumerated topics, provided the public receives notice of the body's intent to meet in executive session, the agenda includes the specific purposes for the executive session (29 *Del. C.* § 10002(a)), the vote to meet in executive session is conducted at the public meeting, and all votes are public. An executive session is permitted for the discussion of an individual's qualifications for a job, 29 *Del. C.* § 10004(b)(1), and for "[p]ersonnel matters in which the names, competency and abilities of individual employees . . . are

discussed . . .” 29 *Del. C.* § 10004(b)(9).<sup>2</sup> A public body may use executive session to discuss documents that are not public records, 29 *Del. C.* § 10004(b)(6), such as “records involving labor negotiations.” 29 *Del. C.* § 10002(g)(8). “Strategy sessions . . . with respect to collective bargaining” may be conducted in executive session, but “only when an open meeting would have an adverse effect on the bargaining . . . position of the public body.” 29 *Del. C.* § 10004(b)(4).

### DISCUSSION

We have previously held that notice of an executive session does not have to give as full an explanation of the topics for discussion as an agenda for a public meeting and, when confidential personnel matters will be discussed, the notice does not have to include the name of the individual under discussion. *Del. Op. Att’y Gen. 07-IB20*, 2007 WL 4732803, \*2 (Del. A.G. Sept. 10, 2007). Under that standard, the notice for the January 12, 2010 executive session was sufficient. Moreover, use of executive session to discuss the Chief of Police’s job qualifications and performance is clearly permissible under 29 *Del. C.* §§ 10004(b)(1) and (9).

The January 12, 2010 executive session also addressed the Town’s negotiating strategy regarding the Chief of Police’s contract. While FOIA does not expressly address strategy sessions regarding employment contracts outside of the collective bargaining context, we have previously determined that FOIA “protects ‘the competitive position of a public body engaged in ongoing contract negotiations.’” *Att’y Gen. Op. 05-IB24.*” *Del.*

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<sup>2</sup> Subsections (1) and (9) of section 10004(b) both provide that matters must be discussed in public if the person under scrutiny so requests. The record here does not reveal whether the Ocean View Chief of Police was given an opportunity to request a public discussion.

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*Op. Att'y Gen. 06-IB15*, 2006 WL 2355969, at \*3 (Del. A.G. July 24, 2006). The open meeting exceptions for discussion of "records involving labor negotiations." 29 *Del. C.* § 10002(g)(8), read in conjunction with the exception at 29 *Del. C.* § 10004(b)(4) for "[s]trategy sessions . . . with respect to collective bargaining. . . when an open meeting would have an adverse effect on the bargaining . . . position of the public body," evidences the General Assembly's intent not to undermine labor negotiations.

FOIA must be construed liberally to effect open government, and its exceptions must be construed strictly. *Del. Solid Waste Auth'y v. News-Journal Co.*, 480 A.2d 628, 631 (Del. 1984). FOIA's purpose, however, is not to stymie legitimate governmental functioning. *See Adm'r, FAA v. Robertson*, 422 U.S. 255, 262 (1975). Neither is FOIA intended to impose a financial burden on the public. *See 29 Del. C.* § 10003(a) ("Any reasonable expense involved in the copying of . . . records [requested pursuant to FOIA] shall be levied as a charge on the citizen requesting such copy."). A public body forced to formulate publicly its strategies for contract negotiations would be at a decided negotiating disadvantage, and the public would not be well-served thereby.

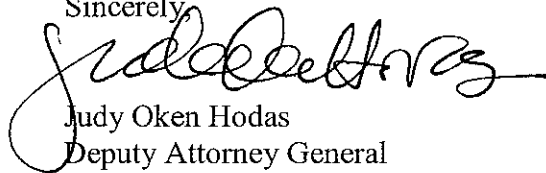
### **CONCLUSION**

For the reasons stated herein, the Town of Ocean View did not violate FOIA in conducting an executive session to discuss renewal of the employment contract of a Town employee. It should be noted, however, that the Town may have violated 29 *Del. C.* § 10004(e)(5) by failing to state its reason for modifying the agenda for the January 12 regular meeting less than seven days before the meeting date. You did not raise this issue

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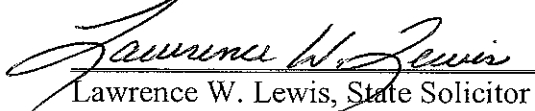
in your complaint, and as the Town has not had an opportunity to address it, there is no reason to invalidate the meeting for this possible violation. Nonetheless, the Town is cautioned to comply in the future with all of the notice requirements of 29 *Del. C.* § 10004(e).

Sincerely,



Judy Oken Hodas  
Deputy Attorney General

Approved:



Lawrence W. Lewis, State Solicitor

cc: Katrina Barbour, Opinion Coordinator ✓  
Dennis L. Schrader, Esquire